Nos. 85-558, 85-559 and 85-560

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PAUL H. COPLIN and PATRICIA COPLIN,
Petitioners,
v.
UNITED STATES OF AMERICA

ROBERT E. O'CONNOR and GLADYS E. O'CONNOR,
Petitioners,
v.
UNITED STATES OF AMERICA

JACK R. MATTOX and MARIA MATTOX,
Petitioners,
v.
UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

In their opening briefs petitioners put forward a substantial number of arguments in support of their claim that Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty, September 7, 1977, T.I.A.S. No. 10030, exempts employees of the Panama Canal Commission from United States income taxes for work performed for the Commission in Panama. The

government's response warrants a brief reply. Because the structures of the separate opening briefs were somewhat different, petitioners' consolidated reply will basically follow the organization employed by Chief Judge Kozinski in his *Coplin* opinion, and the brief will reply to the government's arguments as they relate to the various findings and holdings that led the Claims Court correctly to decide for the petitioners.

A. Obviously, the single most important reason for the Claims Court's holding that Article XV exempts petitioners from United States income taxes in their work for the Panama Canal Commission is the plain language of the provision. The relevant Article is entitled simply "Taxation," and the relevant paragraph within the Article describes the scope of the exemption as including "any taxes," which on its face includes United States taxes. Indeed, if the contracting governments intended, as petitioners submit they did, to exempt petitioners from both Panamanian and United States taxes, it is difficult to imagine what other language could more plainly evince that intent. Although this plain language does not end the inquiry under traditional rules of treaty interpretation, it places upon the government a heavy burden to demonstrate that petitioners' interpretation "effects a result inconsistent with the intent or expectations of its signatories." *Maximov* v. *United States*, 373 U.S. 49, 54 (1963).

To satisfy its burden, the United States argues (U.S. Br. 20-22) that when read "in context," the "any taxes" language cannot reasonably be understood to embrace United States taxes. The government's reasoning on this issue is self-defeating. It points out that both paragraphs 1 and 3 of Article XV relate only to Panamanian taxes and from this the government concludes that paragraph 2 should be similarly limited. But the government inexplicably ignores the fact that paragraphs 1 and 3 also include specific references to *Panama*. Thus, the plain

language of these provisions, read in context, expressly limits their reach to Panamanian taxes. The absence of any similar limiting language anywhere in paragraph 2 creates a strong inference, in support of the plain language, that the scope of the tax exemption *is not limited to Panama.*

What makes the inference even stronger is that the language in Article XVI of the Status of Forces Agreement ("SOFA") in implementation of Article IV of the Panama Canal Treaty concerning military personnel, which served as the model for Article XV (U.S. Br. 19 n. 11), contains a specific reference to Panamanian law. That reference was deleted by the United States drafters, making Article XV on its face apply to "all taxes" without any limitation. Thus, understood *in context*, the language in Article XV exempts petitioners from all taxes for income received from the Commission.

The United States' explanation for the deletion is strikingly weak. It asserts (U.S. Br. 25 n.16) that petitioners' reliance upon the removal of the "Panamanian law" reference in Article XV is unsupported by "the record." But the brief cites *nothing* in the record to justify removal of the phrase. Instead, the government asserts, without support, that the doctoring of the provision was done to eliminate any problem in the event Panama changed its tax laws. But the government does not explain why this identical language would still be kept in Article XVI of the SOFA Agreement and removed from Article XV if the sole basis for the action was to respond to potential problems in Panamanian law. Thus, the more rational explanation for the disparate language is that the plain meaning of Article XV which exempts all taxes was intended by the parties.

The United States argues that the relevant sentence exempting United States taxes for work for the Commission must be amended judicially because petitioners' plain meaning interpretation "would give credence" to an

argument that all income "derived from sources outside . . . Panama" is also exempt under the Treaty. U.S. Br. 16. But that interpretation is not compelled by the language in the second sentence. In order to give meaning to the word "similarly" in the second sentence, it is perfectly reasonable to interpret the word "income" to mean "income received as a result of [Commission employees'] work for the Commission" which is "derived from sources outside of the Republic of Panama." This would mean that the cumulative effect of paragraph 2 would be that all income relating to Commission activities, from whatever source, would be exempt from both countries' taxing powers, but that each could tax non-Commission-related income under their domestic laws.

B. After finding that the plain meaning of the first sentence of Article XV, read in context, plainly provided a tax exemption, the Claims Court analyzed the negotiating history to determine whether there was clear proof that the signatories reached an understanding about the provision that departed from its clear language. As the Claims Court held: "there is *no* contemporaneous evidence as to the meaning either [party] placed on the language of Article XV. . . ." 6 Cl. Ct. 126 (emphasis in original). Obviously, then, there is no basis for relying upon the negotiating history to amend the language agreed to by the parties.

The government nevertheless selectively analyzes (U.S. Br. 25-27) the negotiating history and concludes that "nothing in the negotiating history suggests that anything other than the question of exemption from Panamanian taxation was ever considered." *Id.* at 27. To be sure, Panama's primary concern was to exercise its sovereignty over the Canal by being able to tax all employees there. It did, however, expressly propose that the United States grant Commission employees a tax credit so that the United States, in effect, would be taxing the employ-

ees, but giving some of the money to Panama. C.A. App. 117. Thus, contrary to the government's assertion, the negotiating history contains a Panamanian proposal to modify domestic United States' taxation in order to give effect to Panama's sovereignty over the Canal.

This discussion in the weeks leading up to the final draft proposal of Article XV by the United States significantly colors the effect that the government's proposal had on the Panamanian negotiators.[1] Instead of sovereignty concerns being dealt with by both parties retaining the right to tax, the United States proposed to solve the problem by allowing *neither party* to tax that income.[2]

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[1] The government's claim that the "record clearly indicates that August was not the first time that Panama had seen the text of Article XV" ignores the record and the Claims Court's contrary findings. The Court found that "the language that eventually became Article XV of the Implementation Agreement was not considered during any of the sessions for which we have a transcript or other contemporaneous documentation," which includes all of the sessions up to and including July 21. 6 Cl. Ct. at 131. The "record" the government relies upon for its contrary view is an answer to an interrogatory which merely indicates that the internal draft of Article XV dated July 13 was "the proposal presented to the Panamanian negotiators." C.A. App. 26. The answer does not indicate *when* that draft was presented to the Panamanians. Nor could it have; its author was not present at the negotiating sessions. Thus, the only available evidence indicates that the United States' proposal was made in August and accepted on the basis of the careful language employed by the United States which exempted "any taxes" and deleted the reference to Panama. The timing of the proposal undercuts the government's assertion that Panama accepted this proposal because it "reflect[ed] the United States' position." U.S. Br. 28.

[2] The government belittles as the product of "surmise and conjecture" the Claims Court's interpretation of the negotiating history as indicating that the parties reached a compromise on the sovereignty issue. But the government's alternative theory that "Panama accepted the text drafted by the United States to reflect the United States' position" is based on pure speculation. U.S. Br. 28. The Court's theory at least is consistent with the negotiating history. The United States cannot explain why Panama would

This interpretation is fully consistent with the United States' position that it could not tolerate Panamanian taxation of United States employees. Thus, the negotiating history supports petitioners' interpretation of the meaning of the Article. In any event, there is no explicit statement of understanding by both sides at the negotiating table indicating that paragraph 2 of Article XV applied *only* to Panamanian taxes, and therefore, the negotiating history does not satisfy the standards in *Maximov* for disregarding the plain language of the Treaty.[3]

C. After the Claims Court held that the language and history of Article XV, as agreed to at the bargaining table, provided a tax exemption to petitioners, the Claims Court considered whether any action by the parties subsequent to the agreement clearly demonstrated that they

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suddenly abandon its interest without any discussion on this issue about which it is undisputed the parties had previously been "widely divergent." 6 Cl. Ct. at 129.

[3] The government's ultimate response to the Claims Court's finding that the language of Article XV was the product of a compromise over the sovereignty issue is that the government would never enter into such an agreement because Congress and the Executive Branch generally disapprove of such arrangements. In the same breath, the government concedes that "the United States has negotiated a few treaties with tax-sparing provisions." U.S. Br. 38 n.24. There is thus nothing sufficiently unusual in the Claims Court's interpretation that would justify ignoring the plain language employed by the treaty signatories.

Moreover, even if the Agreement provided unique treatment for Canal Commission employees, that would not be unusual. Those employees have been treated differently by the United States in a host of different ways. For instance, Commission employees have no access to PX or Commissary services, are not paid out of the United States Treasury, have a separate leave system, and are provided a "tropical differential" in their salary. Indeed, prior to 1954, employees of the Commission, in effect, did not pay United States income taxes. Thus, the Agreement is fully in keeping with Congress' past practices toward Commission employees.

actually intended the provision to have the meaning now ascribed to it by the United States in its pursuit of additional tax dollars. The Claims Court held that no post-agreement, pre-litigation materials were sufficient to overcome the plain meaning doctrine in interpreting Article XV.

The government emphasizes heavily (U.S. Br. 29-32) the legislative history of the Senate ratification process. Oddly, the government cites not a single case from this or any other court concerning what role this legislative history should play in determining the meaning of Article XV. Ordinarily, internal deliberations of *one* of the signatories to an international agreement is not relevant to interpreting that agreement, because the Court must determine what *both* parties understood the agreement to mean. *Fourteen Diamond Rings*, 183 U.S. 176, 180 (1901); Restatement (Second), Foreign Relations Law of the United States § 147 (1965). Nevertheless, the legislative history is almost as silent as the negotiating history on the critical issue of whether Article XV's exemption is limited to Panamanian taxes. The section-by-section analysis, quoted by the United States (U.S. Br. 31), clearly states that Article XV exempts Commission employees from Panamanian taxes, but does *not* state that the exemption is *limited* to Panamanian taxes. S. Exec. Rep. 95-12, 95th Cong., 2d Sess. 155 (1978). Given the importance to the government, as reflected in the internal documents created during the negotiating process (See C.A. App. 152, 154, 162), of exempting United States employees from Panamanian taxes, the State Department's decision to emphasize this point is understandable. State was concerned that if Panama could tax employees of an agency of the United States, opponents of the Treaty would try to use that fact to defeat its ratification. C.A. App. 162. The Senate Report thus clarifies one issue but does nothing to clarify the issue presented here—the effect of Article XV on

United States' taxes. The section-by-section analysis is silent on that issue.[4]

The government places particular emphasis upon the exchange during the Hearings between Herbert J. Hansell, Legal Advisor of the State Department, and Senator Stone. But that exchange does not warrant amending the Agreement judicially. In the first place, the government cites no case, and we are aware of none, in which this Court has relied upon a single statement made during a hearing as the sole basis to justify ignoring the plain meaning of a statute, much less a treaty. See *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, 493 (1931); *March* v. *United States*, 506 F.2d 1306, 1314 n.30 (D.C. Cir. 1974). Second, what is truly meaningful from the exchange is the contrast between the clarity of Hansell's statement at the hearings compared to the statement in the Senate Report. The latter, which could serve as a legitimate basis for inferring the Senate's understanding of Article XV, is silent with respect to United States taxes. Third, the exchange is ambiguous. Hansell's promise was to find some way, short of using an understanding, to resolve the problem identified by Senator Stone. The United States reasons that because the Senate did not seek a reservation or understanding on Article XV, the Senate must have agreed with Hansell's statement. An equally plausible explanation for Senate inaction is that the Senate was satisfied

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[4] Even if the Court were interpreting an ordinary statute of Congress, instead of a provision in a Treaty's implementing agreement, the statement in the Senate Report would not suffice to warrant ignoring plain language in the statute as enacted. It is well settled that statements of legislators and other legislative materials should not be used to construe a statute contrary to its plain terms. *See Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979). "Such aids are only admissible to solve doubt and not to create it." *Railroad Commission of Wisconsin* v. *Chicago, B. & Q.R.R.*, 257 U.S. 563, 589 (1922).

with the exemption embodied in the plain meaning of the Agreement. Alternatively, Hansell's promise to resolve the matter without using an understanding would fully explain why the Senate did not act independently. It may have relied upon Hansell's representation that the matter could be resolved without recourse to that particular diplomatic channel. The Senate's reliance was misplaced, but that provides no basis for this Court to disregard the language in the Agreement.[5]

D. Even though the Claims Court held that the government's interpretation of Article XV was unsupported by the language of the Agreement, the negotiating history leading up to the Agreement and events prior to its ratification, the Court nevertheless carefully considered and rejected the government's claim that the Executive Branch's interpretation of this international agreement is entitled to "great deference." 6 Cl. Ct. 135-143. The government strongly renews its argument here and asks that its self-serving interpretation of Article XV be upheld, regardless of all other considerations.[6] What the United

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[5] The government's use of the legislative materials is completely misguided. It assumes that the petitioners must find evidence that the Senate expressly intended to exempt them from having to pay United States taxes on Commission based income. Because of the plain language of the Agreement, however, it is the *government's* burden to show that the Senate clearly understood the language as having the special meaning argued for by the government.

[6] The government argues (U.S. Br. 13) that deference to its interpretation is warranted even if the Court is convinced that this interpretation conflicts with the understanding of our treaty partner at the time of the Agreement. This is not the law. The cases cited for this extraordinary proposition do not support such a rule. In *Factor* v. *Laubenheimer*, 290 U.S. 276, 298 (1933); *Charlton* v. *Kelly*, 229 U.S. 447, 473 (1913); and *Whitney* v. *Robertson*, 124 U.S. 190, 194-195 (1888), cited by the government (U.S. Br. 13), the Court did not hold that the Executive Branch's interpretation must be respected, even if it is contrary to the contemporaneous understanding of a treaty partner. The Court decided the very different issue of whether it should disregard a treaty obligation

States does not discuss are the reasons why the Court defers to the Executive Branch on such issues and whether those reasons apply in this case. Obviously, if they do not, then the Court should not defer to the government's proposed interpretation because in no event are the views of the Executive Branch conclusive upon the Court; "courts interpret treaties for themselves." *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961); *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 184 (1982).[7]

The Claims Court correctly identified the reasons for deferring to the federal government's interpretation of an international agreement—1) the Executive Branch has negotiated the Treaty and therefore may have unique insights into the parties' state of mind; 2) the Executive Branch is responsible for conducting foreign affairs and the Court's interpretation of a Treaty could interfere with those relations; 3) the Executive Branch administers the treaty and therefore may have expertise derived from experience with the treaty which could assist the Court. Restatement (Second), Foreign Relations Law of the United States, § 147(1)(c), (f), (h).

The government in its brief makes absolutely no attempt to show that *any* of these factors applies here. First, it has always been conceded that the State Department has no contemporaneous evidence concerning the

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assumed by the United States because the other signatory refused to abide by the provision. Those cases do not support the government's claim of slavish judicial deference to the Executive Branch's interpretation. Indeed, the government's claim would effectively nullify the rule that the interpretation of the Executive Branch is "not conclusive" on the Court. *Charlton* v. *Kelly*, 229 U.S. at 468.

[7] In *Sumitomo*, this Court made clear that the extent of the deference due to the Executive's interpretation depends greatly on whether "that interpretation follows from the clear treaty language. . . ." 457 U.S. at 185. Where, as here, the Executive's interpretation clearly serves selfish financial interests, and it conflicts with the language of the Agreement, the Executive's interpretation should be rejected.

negotiations leading up to the August session during which Article XV was finally proposed. Second, the government has never indicated that Panama or any other nation would be concerned at all if the Agreement were interpreted in accordance with its plain meaning.[8] Finally, there have been no "subsequent practices of the parties in the performance of the agreement" concerning Article XV that could serve as the basis for the Executive Branch's interpretation. Restatement (Second), Foreign Relations Law of the United States, § 147(1)(f). To the contrary, the agency charged with administration of the Treaty, the Panama Canal Commission's Supervisory Board, clearly indicated through its Panamanian members that it understood the Agreement to provide a tax exemption for United States' citizen employees. See O'Connor Br. 40-41. The government ignores these statements, but, if deference is owed to anyone, it is to the Board, and its understanding of the Agreement contrasts sharply with that of the Executive Branch. Thus, the government's argument amounts to no more than a request for deference for the sake of deference. This is no basis for rejecting the plain meaning of an international agreement.

E. The one item that the Claims Court could not evaluate was the diplomatic note mysteriously obtained from Panama on February 22, 1985, and filed with the Federal Circuit on the eve of oral argument. Not only was no diplomatic note produced in the Claims Court, but counsel for the government *repeatedly* represented to the Court that 1) no diplomatic note could be obtained; 2) any note the State Department might obtain would be irrelevant to this case; and 3) the government wanted the case to be decided solely on the record before the Claims Court as of March 8, 1984. 6 Cl. Ct. at 147.

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[8] We analyze the post-litigation, diplomatic note in the next section, but it is worth mentioning here that nothing in that document expresses any concern about U.S.-Panama relations if the Agreement is interpreted to exempt all taxes.

The government's desperate use on appeal of the diplomatic note in light of the statements made to the Claims Court is the best evidence of the manifest weakness in the government's interpretation of Article XV under the ordinary rules of treaty construction. Given the suspect circumstances surrounding the production of this note, which are discussed in petitioners' opening briefs (Coplin Br. 30-31; O'Connor Br. 14-17), the government's decision to rely upon it could only be justified by a strongly felt sense of need to rehabilitate its case on appeal. In light of the strength of the Claims Court's opinion, the government's concern was well founded. But the desire to win a case does not justify the government's blatant disregard for the ordinary judicial process.

In this Court, the government asserts, at the end of its summary of the traditional methods of interpreting international agreements, that "[i]n any event, the Government of Panama has now provided the United States with its official interpretation of the relevant provision," (U.S. Br. 9),[9] and therefore, the Court need not concern itself with the flaws in the government's case.

Petitioners submit that the diplomatic note is entitled to little or no weight under traditional rules of treaty interpretation. Alternatively, the Court certainly should not permit the government, after its representations to the Claims Court, to benefit from the note in these cases. The Court should not accept the note at face value as the Federal Circuit did. Certainly the Court should not affirm without allowing a factual inquiry into the circumstances surrounding the government's complete reversal of position and its acquisition of the diplomatic note. To

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[9] Given the government's unwillingness to reveal the circumstances surrounding the acquisition of the note, there is no small irony in the fact that the reference to "its" in the quotation from the government's brief could quite reasonably be read to refer to the "United States."

hold otherwise would violate fundamental notions of fair play that underlie the adversary process.

1. The Restatement (Second) on Foreign Relations Law contains a list of nine factors to be considered in interpreting any treaty. This list does not include a non-contemporaneous diplomatic note created and produced during the course of litigation. Restatement (Second) § 147(a)(i). Although the list was not intended to be exhaustive, the American Law Institute's reason for excluding a note like that from Panama is obvious. Such a *post hoc* recital is largely useless if not misleading, in attempting to understand the intent of the parties to an agreement reached many years before.[10] Thus, as an interpretative aid, this note is no more authoritative than a statement of a subsequent Congress about a law previously enacted, which is accorded little or no weight in interpreting the earlier legislation. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968); *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958).

The government argues that this Court's decision in *Sumitomo* clearly supports reliance on the Panamanian note. The note in *Sumitomo* was very different; it did no more than indicate Japan's agreement with the pre-existing interpretation of this government and it was based on extremely unambiguous language. Indeed, even though the parties to the treaty in *Sumitomo* agreed on an interpretation that "follow[ed] from the clear treaty language," this Court did not end its inquiry there. 457 U.S. at 185. In sharp contrast to that case, the government here asks the Court to disregard the plain meaning of the Agreement in light of a diplomatic note, created

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[10] Cf. Fed. R. Evid. 803(6), 804(8); *Palmer* v. *Hoffman*, 318 U.S. 109, 114 (1943) (rejecting certain business records "calculated for use essentially in the court, not in the business"). What the Court said in *Palmer* about the railroad's report can be applied directly to the unpublished diplomatic note: "its primary utility is in litigating," not in diplomacy. *Id.*

for no reason except to further this government's interest as a *litigant*. This plainly is not *Sumitomo*.

Moreover, the rule proposed by the government is extremely shortsighted. Under this theory, any change in the administration of either government provides a complete opportunity to rework any international agreement without having to go through the treaty-making process. Thus, no agreement has any set shelf life. Such a rule will clearly have an adverse effect on the willingness of other nations to enter into bilateral agreements with this government.

Under the government's theory, the Senate's understanding of a treaty can always be rejected by a new administration if it can convince a treaty partner to supply a diplomatic note. This demeans the Senate's ratification power and conflicts with the basic notion that "[a] treaty, then, must be a *bona fide* agreement between states, not a 'mock marriage,' nor a unilateral act by the United States to which a foreign government lends itself *as an accommodation* . . . .". L. Henkin, Foreign Affairs and the Constitution 143 (1972) (emphasis added). In order to accord proper respect for the treaty-making process, the Court should reject the use of diplomatic notes unless: 1) they are produced as part of the ordinary process of administering an international agreement, as opposed to being used solely in anticipation of use in litigation, Restatement (Second), Foreign Relations Law § 147 (referring to the performance under the treaty); or 2) unless, as in *Sumitomo*, the note merely reinforces the conclusion compelled by all other available interpretative factors concerning the treaty. Under these standards, the note in this case should not be given the dispositive weight requested by the United States.

2. If, however, the Court in the abstract would be willing to give some weight to Panama's diplomatic note, it is clear that in this case the government should be bound by its representations to the Claims Court that no note would

be forthcoming and that, even if such a note existed, it would not be relevant. The government's response to petitioners' argument that its litigating tactics were grossly unfair is deeply disturbing. First, it argues that technically this is not an appropriate case for judicial estoppel because the government is not taking inconsistent positions in separate lawsuits. U.S. Br. 43 n. 26. This is hardly a defense; it is, if anything, worse for the government to take an absolutely inconsistent position *in the same case on appeal* and thereby to render the trial court proceeding meaningless. Second, the government argues that it has been consistent in this litigation because all along it has wanted to win this case. But, a uniform desire to win does not justify the government's decision to reject the need for a note in the trial court and yet rely upon the note on appeal. Finally, the government offers its most cynical argument—this Court should "not blind itself" to the valuable information in this diplomatic note. Instead the government asks the Court to "blind" itself to the unfairness inherent in the government's action and the affront to the Claims Court. If the Court must choose, it should disregard the note in order to remedy the government's attempt to render the trial court proceedings a nullity.

3. At a minimum, the Court should not accept the diplomatic note at face value and rely upon it to interpret Article XV in a manner that conflicts with its plain meaning. Obviously, petitioners strongly believe that the Court should reverse the judgment of the court of appeals on the basis of the plain meaning of the Agreement, but if the Court is unpersuaded, it should not simply affirm. The Claims Court should be given an opportunity to inquire into why the United States government shifted its position on appeal.[11] Certainly, peti-

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[11] Petitioners recognize and are sensitive to the unusual inquiry called for on remand. An inquiry into diplomatic efforts and motivations should be permitted only in extraordinary circumstances.

tioners' claim would be significantly enhanced if the representations made to the Claims Court reflected unsuccessful efforts by the State Department to obtain similar notes in the past from the Panamanian government which had negotiated and signed the treaty. This would be strong evidence that the Claims Court was correct that Panama understood the Agreement to embody a compromise at the time it was signed. The only way to determine that issue, however, is to remand the matter for further discovery and a determination of whether the government has dealt fairly with the Claims Court and the petitioners in this case.

* * * *

The fundamental flaw in the government's submission to this Court is that it refuses to deal with the basic issue in this case: what did Panama and the United States agree to *in August 1977*. The government has gone to great lengths to demonstrate what the State Department, the new Panamanian regime and even the House of Representatives might prefer *today*, but it has made no serious challenge to the Claims Court's findings and holding concerning the expectations of the parties in light of the negotiations leading up to the final agreement and the language actually chosen in 1977.

The government's attempted sleight of hand must fail. Its *post hoc* "evidence of intent" created because of litigation provides no basis for this Court to rewrite the agreement in order to deprive petitioners of the third-party beneficiary rights which are contained in Article

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But, it is the government which has caused this problem by making very clear representations in the Claims Court and acting directly contrary to those statements on appeal. If the government would prefer to avoid the problem caused by its conduct, it could ask the Court again to decide the case on the record before the Claims Court. If, because of the weakness of its interpretation without the diplomatic note, the government prefers to have the note considered, then it should be prepared to submit its actions to judicial scrutiny.

XV. If Panama and the United States are now in agreement that Article XV is no longer warranted, there are methods available to effect that result. The course the government has chosen—asking this Court to amend the Agreement—is not one of them. The Court therefore should decline the government's invitation to substitute itself for the political branches of the governments of the United States and Panama and instead exercise solely its judicial function by enforcing the plain meaning of Article XV.

CONCLUSION

For the foregoing reasons and those stated in the opening briefs of the petitioners, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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